Supreme Court, U.S.
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NO. 90-1430

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NELSON R. RABY, et al.

Petitioners,

VERSUS

M/V PINE FOREST, In Rem,
DELICA SHIPPING, S.A., and
INUI STEAMSHIP CO., LTD.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Did the Ninth Circuit Court of Appeal err when it provided that in a suit under the Seaman's Wage Statute, 46 U.S.C. § 10313, the shipowner and/or master may deposit into the registry of the court all past due back wages in order to comply with the terms of the statute that "the master shall pay to the seaman" the wages due, and by doing such toll the accrual of penalty wages?

II. Did the Ninth Circuit err in holding that under 46 U.S.C. § 10313 accrued penalty wages do not need to be tendered, either actually or into the registry of the court, along with back wages due to toll the further accrual of penalty wages?

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners

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PROCEEDINGS AND THE CASE BELOW

The district court opinion is designated as Raby v. M/V Pine Forest, Civil No. 90-5038T, reported at 1990 A.M.C. 2441 (W.D.Wash. 1990); on supervisory writs to the United States Court of Appeal for the Ninth Circuit, Raby v. M/V Pine Forest, No. 90-35618, reported at 918 F.2d 80 (9th Cir. 1990).

JURISDICTIONAL STATEMENT

Petitioners seek review of an order of the United States Court of Appeals for the Ninth Circuit handed down on October 29, 1990, vacating the district court's supersedeas bond and order that the bond be reformed in accordance with its opinion thereof. Petitioners filed in the Ninth Circuit Court of Appeals a Petitioner for Rehearing with Suggestion for Rehearing En Banc, on November 9, 1990. That petition and the suggestion were denied on January 17, 1991. Jurisdiction of this Honorable Court is predicated upon 28

U.S.C. § 1254, writs of certiorari to United States Courts of Appeal.

STATUTES RELIED UPON

The issue brought before this Court is not one of constitutional consideration, but is interpretation of the provisions of 46 U.S.C. § 10313 of the Shipping Code.

46 U.S.C. § 10313, in pertinent part (and set forth in its entirety in the Appendix at Page 23) reads:

"(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed. . . .

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section."

STATEMENT OF THE CASE

Plaintiffs, 21 Filipino seamen who served aboard the vessel the M/V Pine Forest, a bulk carrier, flying the flag of Vanuatu, instituted this action in the United States District Court for the Western District of Washington for unpaid wages and statutory penalties pursuant to 46 U.S.C. § 10313, as well as other claims not the subject of the opinion of the appellate court complained of nor this petition for writ of certiorari. Named Defendants are the vessel M/V PINE FOREST, in rem, and its owners and operators, Inui Steamship Co., Ltd., and Delica Shipping, S.A. The jurisdiction of the district court in this matter was based upon 28 U.S.C. § 1331, federal question jurisdiction, for claims arising under 46 U.S.C. § 10313 and 28 U.S.C. § 1333, admiralty and maritime jurisdiction. Defendants were engaged in the practice of keeping two sets of books or wage records, specifying two entirely different rates of pay, all

in violation of United States, Vanuatu, and international law.[1] Upon the arrest of the vessel, Defendants partially paid Petitioners the wages stipulated in the shipping articles which were subject of the suit, and then promptly counterclaimed for the return of these wages.

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[1]The purpose of keeping double books was to cause seamen's unions and port authorities around the world to believe that the seamen on board were being paid wages in accordance with the shipping articles setting forth union wage scales, when in fact they were being paid as little as one-fourth of that amount. This practice gave defendants an unfair competitive advantage over United States shipowners, in contravention of the express purpose enunciated in making the wage statutes of 1915 applicable to foreign seamen:

> "First, to give freedom to seamen and improve their conditions; second, to promote safety of life at sea; third, to equalize the wage cost of operating vessels, foreign and domestic, taking cargos or passengers from ports of the United States."

Congressional Record-Senate, October 22, 1915 at 5748. See also Strathearn S.S. Co. v. Dillon, 252 U.S. 348 (1920).

The trial of this matter was held on May 21 through 23, 1990. The trial court rendered judgment on August 6, 1990, finding that the Defendant vessel and its owners, Delica Shipping, S.A., and Inui Steamship Co., Ltd., were in arrearages for wages due and that the wages were withheld without sufficient cause in violation of 46 U.S.C. § 10313. Judgment was rendered in the total sum of $32,657,006.00. On August 8, 1990, Defendants moved for a supersedeas bond to stay execution of the judgment pending appeal to the United States Court of Appeal for the Ninth Circuit. Pursuant to this motion, the district court set the supersedeas bond on August 10, 1990. Defendants filed a Notice of Appeal with the United States Court of Appeal for the Ninth Circuit on August 14, 1990, and an Emergency Motion under Circuit Court Rule 27.3 on August 15, 1990, asking that they reset the supersedeas bond under Federal Rule of Appellate Procedure, Rule 8. The Ninth

Circuit, by order on October 29, 1990, vacated the district court's supersedeas bond and ordered the bond to be reset in accordance with its opinion thereof. Plaintiffs filed in the Ninth Circuit Court of Appeal a Petition for Rehearing with Suggestion En Banc on November 9, 1990, on the basis of the issues of law complained of herein. That Petition for Rehearing with Suggestion En Banc was denied.

ARGUMENT IN FAVOR OF GRANTING PETITIONERS' APPLICATION FOR WRITS

Rule 10 of the Rules of the Supreme Court provides that one of the special and important reasons for granting a writ of certiorari to review a court of appeal decision is when a United States court of appeal has rendered a decision in conflict with the decision of another United States court of appeal on the same matter. Petitioners' request review by this Honorable Court on this basis.

Rule 11 of the Rules of the Supreme Court provide that a petition for writ of certiorari to a U.S. court of appeals prior to a final judgment will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court. 28 U.S.C. § 2101(e) provides that there is no time delay for taking a writ pursuant to Rule 11. Plaintiffs represent that for the following reasons it is imperative that this Honorable Court correct the growing discrepancies in intercircuit decisions regarding application of 46 U.S.C. § 10313, all as shown below.

This Honorable Court has granted certiorari on numerous previous occasions to resolve questions involving the the myriad of interpretations of 46 U.S.C. § 10313 and its

predecessors created by the courts of appeal.[2] The latest attempt to direct the courts of appeal on the uniform application of this statute was in Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 73 L.Ed.2d 973, 102 S.Ct. 3245 (1982).[3]

Interpretations and statutory constructions of 46 U.S.C. § 10313 were already in conflict among the circuits prior to the Ninth Circuit opinion complained of herein. The opinion of

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[2]Patterson v. Bark Eudora, 190 U.S. 169 (1903); Pacific Mail S.S. Co. v. Schmidt. 241 U.S. 245 (1916); Strathearn S.S. Co. v. Dillon, 252 U.S. 348 (1920); McCrea v. U.S., 294 U.S.23 (1935); Collie v. Fergusson, 281 U.S. 52 (1930); American Foreign S.S. Co. v. Matise, 423 U.S. 150 (1975).

[3]In Griffin, this Court granted certiorari for the sole purpose of deciding whether or not the penalty wages provided under 46 U.S.C. § 596 (now 46 U.S.C. § 10313) could be equitably tolled by the courts. That answer was in the negative, as "[t]he words chosen by Congress, given their plain meaning, leave no room for the exercise of discretion. . . " Id., at 570.

the Ninth Circuit of October 29, 1990, significantly widens the conflict and now renders seamen's wage litigation to results depending to a great extent on the location of the suit. This Honorable Court in Miles v. Apex Shipping, --- U.S. ---, 111 S.Ct. 317 (1990), noted the overriding concern for uniformity and application of maritime matters. Along with the desire for uniform approach in maritime matters, there is the concomitant desire for uniformity of application of federal statutes. 46 U.S.C. § 10313 should be applied uniformly, both as a matter of nationally imposed legislation and a rule of maritime law.

This Honorable Court noted in Griffin v. Oceanic Contractors, Inc., supra, and the Third and Fourth Circuits in Swain v. Isthmian Lines, Inc., 360 F.2d 81 (3rd Cir. 1966), and Southern Cross S.S. Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960), cert. denied, 365 U.S. 869 (1961), provided that the unlawfully withheld

wages could be placed in the hands of the court to toll the running of the penalty period. Both this Court in Griffin, supra, and the Fourth Circuit in Southern Cross, supra, applied this rule as an interpretation of this Court's decision in Pacific Mail S.S. Co. v. Schmidt, 241 U.S. 245 (1916), which held that penalty wages did not accrue during appeal if the appeal was taken on reasonable grounds.[4] The opinion in Griffin seemed merely to note these decisions and not necessarily endorse them nor disturb their actual holdings as to the steps necessary to terminate the accrual of penalty wages.[5]

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[4]If the Southern Cross decision is merely an interpretation of this Court's decision in Pacific Mail, then deposit into the registry of the court, as was done in Southern Cross must come after judgment, and during the pendency of appeal.

[5]In Southern Cross, supra, the court stated that penalty wages would no longer accrue if wages and accrued penalty wages were deposited in the court; in Swain, supra, the court stated that the accrual of penalty wages terminated upon the

Subsequently, after Griffin, the Eleventh Circuit in Chung Yong Il v. Overseas Navigation Co., Ltd., 774 F.2d 1043 (11th Cir. 1985), held that this Honorable Court in Griffin did not mean to endorse the decisions of the Third and Fourth Circuits and, accordingly, found the rationale therein that a holding that wages may be deposited into the registry of the court prior to final judgment was contrary to the intent of Congress in drafting 46 U.S.C. § 10313. The Eleventh Circuit held that the words "The master shall pay to the seaman" were an individualized instruction which required that the wages be placed physically in the hands of the seaman. The court of appeal therein held that constructive tender, through the registry of the court, was not allowed to cease the running of penalty wages. The Eleventh Circuit

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actual payment of wages or the deposit of wages in the court, but cited Southern Cross with approval.

in so doing found that neither the language of the statute nor the underlying policies supported the suggestion that a vessel owner, whose position borders on the frivolous, could continue to litigate and withhold wages without fear of an increased penalty.[6] Further, the Court of Appeal recognized that it was precisely the possibility that large penalties would accrue that should motivate a shipowner to exercise care in computing the wages due to a seaman.

As such, the decision in the Eleventh Circuit in Chung Yong Il, supra, is clearly in conflict with the Third and Fourth Circuits to the extent that they allowed deposit into the registry of the court of a seaman's wages. The Honorable

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[6]The presumption of course is that the wage claim is frivolous. If the wage claim is not frivolous, then, according to the provisions of 46 U.S.C. § 10313, the withholding of wages was with sufficient cause and therefore penalty wages would not be applied at all. Thus, no need to toll the running of penalties.

Justice White of this Court, noting this conflict, dissented in the denial of writs to Chung Yong Il.

The Ninth Circuit, when presented with the identical question presented to the Third, Fourth, and Eleventh Circuits, took a middle of the road approach adopting in full neither the rationale of the Third and Fourth Circuits, nor the Eleventh Circuit, thus creating a three way split among the circuits on the interpretation of 46 U.S.C. § 10313. This was pointed out to the Ninth Circuit by Plaintiffs in a Petition for Rehearing with Suggestion for Rehearing En Banc. However, the Ninth Circuit refused to grant rehearing or rehearing en banc.

The Ninth Circuit opinion can be summarized as follows:

A shipowner or master may deposit into the registry of the court the back wages held without sufficient cause in order to toll the accrual of penalty wages under 46 U.S.C. §

10313(g). The deposit into the registry of the court is authorized both as a means of tolling the penalty wages on appeal and as a substitute for the express requirement that the wages be tendered unconditionally by the master to the seaman.[7] This is arguably the position taken by the Third and Fourth Circuits in Swain, supra, and Southern Cross, supra.[8] This rationale, however, was specifically rejected by the Eleventh Circuit in Chung Yong Il, supra. Thus, the conflict.

Underlying this issue is the requirement long held in other circuits, as well as formerly held in the Ninth Circuit, that the tender of wages

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[7]". . . the master shall pay each seaman . . ." 46 U.S.C. § 10313, paragraph (f).

[8]The Third and Fourth Circuits may actually limit their decisions to issues of appeal, since they are but interpretations of Pacific Mail, supra. See Griffin, supra, at 574, n.9.

by the master to the seaman must be unconditional.

The rule that a tender of wages be unconditional is found in the Second, Fourth, Fifth, formerly the Ninth, and the Eleventh Circuits. See Forster v. Oro Navigation Co., 128 F.Supp. 113 (S.D.N.Y. 1954), aff'd. at 228 F.2d 319 (2d Cir.); Mandelin v. Kenneally, 11 F.2d 344 (4th Cir. 1926); The Fletero v. Arias, 206 F.2d 267 (4th Cir. 1953); Samad v. The Etivebank, 134 F.Supp. 530 (E.D.Va. 1955); Caribbean Federation Lines v. Dahl, 315 F.2d 370 (5th Cir. 1967); Gerber v. Spencer, 278 F.886 (9th Cir. 1922); Matise v. American Foreign Steamship Co., 488 F.2d 469 (9th Cir. 1974), reversed on other grounds, 423 U.S. 150, 46 L.Ed.2d 354, 96 S.Ct. 410 (1975); Chung Yong Il v. Overseas Navigation, supra. The two Ninth Circuit cases (Gerber, supra, and Matise, supra)

are constructively overruled by the Ninth Circuit's decision complained of herein.[9]

Rule 67 of the Federal Rules of Civil Procedure allowing deposit into the registry of the court was amended in 1983 to allow the party depositing the sum to continue to claim an interest in all or part of it. See the Advisory Committee Notes to Rule 67, 1983 Amendment. Since the litigant can continue to assert an interest in the funds placed on deposit pursuant to the rule of the Third, Fourth, and Ninth Circuits, the tender arguably becomes conditional, from 1983 forward, inasmuch as the seaman cannot withdraw them from the registry of the

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[9]The Ninth Circuit, in violation of its own local rule, overruled these two prior Ninth Circuit panel opinions without a rehearing en banc and without even the benefit of discussion of these two prior cases. Federal Rule of Appellate Procedure 35(a); Greenhow v. Secretary of Health and Human Services, 863 F.2d 633, 636 (9th Cir. 1988). This was pointed out by Petitioners to the Ninth Circuit Court of Appeal which denied Plaintiffs' Petition for Rehearing without comment.

court. The very fact that a seaman has to go into court to litigate for his properly earned wages was considered a violation of 46 U.S.C. § 10313 as recognized by the Eleventh Circuit in Chung Yong Il, supra. Correspondingly, a counterclaim by the defendant to retrieve wages already paid after institution of suit also makes the tender unconditional under the rationale of Chung Yong Il. Thus, another conflict between the circuits exists as to the nature of deposit into the court and whether or not it suffices for an unconditional tender as required by the Second, Fourth, Fifth, and Eleventh Circuits.

Secondly, the Ninth Circuit held that penalty wages that had accrued to date need not be deposited into the registry of the court to toll the further accrual of penalty wages. This holding is arguably in accordance with the decision of the Eleventh Circuit in Chung Yong Il v., supra. However, it is expressly in

conflict with the Third and Fourth Circuit decision in Southern Cross, supra, which held that both accrued back wages and accrued penalty wages must be deposited into the registry of the court to toll further accrual of penalties. Hence, the additional conflict among the circuits.

CONCLUSION

Petitioners submit that the opinion of the Ninth Circuit herein complained of is based upon errors of law. More importantly, for purposes of this Petition for Writ of Certiorari, the opinion of the Ninth Circuit is in conflict with not just one, but as many as four circuits around the country on any given issue. The conflicts created by the Ninth Circuit's opinion complained of herein jeopardizes the uniformity heretofore created on the issues of unconditional tender and whether or not wages and/or penalty wages must be deposited into the

registry of the court to toll further accrual of penalty wages.

The desire that admiralty and maritime laws be applied uniformly, whether a ship sails the Atlantic or the Pacific Ocean, is great. It would ultimately be damaging to the overall structure of the maritime law if the outcome of a case depended upon which port and seaboard a vessel entered. The vast territorial majority of the eastern and southern seaboard of the United States, the Second, Third, Fourth, Fifth, and Eleventh Circuits, are in one way or another in conflict with the Ninth Circuit's decision complained of herein. The opinion of the Ninth Circuit places it in juxtaposition to the holdings of Swain, supra, and Southern Cross, supra, where it once was in harmony. Further, the issues created and clouded by the rejection of Gerber v. Spencer's rationale, both in the Ninth Circuit and other circuits, the misapplication of the holding of the Fourth

Circuit in Southern Cross, and the rejection of the Eleventh Circuit's interpretation of Chung Yong Il, cries out to this Honorable Court to grant a writ of certiorari for the purposes of imposing uniformity among the circuits.

RESPECTFULLY SUBMITTED:

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APPENDICES

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 90-35618

D.C. NO. CV90-5038-JET

NELSON R. RABY, ET AL.

Plaintiffs-Appellees

VERSUS

M/V PINE FOREST, ET AL.

Defendants-Appellants

Filed: January 17, 1991

Before: Wallace, Thompson and
Fernandez, Circuit Judges

The panel has unanimously voted to deny appellees' petition for rehearing and to reject the suggestion for rehearing en banc. It was circulated to the active members of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and suggestion for rehearing en banc is accordingly denied.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 90-35618

D.C. NO. CV90-5038-JET

NELSON R. RABY, ET AL.

Plaintiffs-Appellees

VERSUS

M/V PINE FOREST, ET AL.

Defendants-Appellants

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Submitted August 31, 1990
Motions Panel

Filed: October 29, 1990

Before: J. Clifford Wallace, David R. Thompson,
and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Fernandez

SUMMARY

Appeals

Reversing a judgment of the district court setting the amount of bond required to be posted pending appeal, the court of appeals held that the district court abused its discretion in not allowing for the payment of back wages into court in determining the amount of bond to be posted.

The district court entered judgment in favor of Nelson R. Raby after a bench trial. The court fixed damages in the sum of $32,657,006. Since M/V Pine Forest sought to appeal and wished to stay execution, the district court then set the supersedeas bond at $59,000,000. Of that amount, $19,613,565 represented penalty wages that would accrue at the rate of $26,152 per day while the case was on appeal. Interest on the accruing position was also included. Appellants petitioned for a reduction of the bond.

[1] The court concluded that the district court had abused its discretion. The district court erred when it failed to allow for the payment of the back wages into court, an event that would stop the running of penalties. That option ought to be available to appellants. [2] If all of the back wages owed to a particular plaintiff have been tendered, then the penalty wages will have ceased to accrue as to that plaintiff's claim. However, the court emphasized that penalty wages found to have accrued up to the date of tender of back wages did not need to be tendered to preclude the accrual of further penalties. [3] Although under some circumstances, an appeal from a wage award may itself stop the accrual of penalties if the appeal is taken on strong and reasonable grounds, given the posture of the case and the complexity of the issues, the court was unable to decide the merits of the wage claims at this early stage of the proceedings, and was

unwilling to speculate on the outcome of the appeal. [4] Thus, the court reversed the district court order fixing the amount of the supersedeas bond insofar as it was based upon the projected accrual of penalty wages. The case was remanded for the limited purpose of resetting the bond. In so doing, the district court was to determine whether the full amount of back wages, but not including penalty wages or interest, has been tendered to the plaintiffs, or to any of them.

COUNSEL

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Richard J. Dodson, Baton Rouge, Louisiana, for the plaintiffs-appellees.

OPINION

FERNANDEZ, Circuit Judge:

After a bench trial, the district court found in favor of the plaintiffs and fixed damages in the sum of $32,657,006. Since defendants sought to appeal and wished to stay execution, the district court then set the supersedeas bond at $59,000,000. Of that, $19,613,565 represented penalty wages which would accrue at the rate of $26,152 per day while the case was on appeal. 46 U.S.C. § 10313(g). Interest on the accruing portion was also included. Defendants have asked that we reduce the amounts of the bond.

We review the decision of the district court setting the amount of the bond for abuse of discretion. Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1505 n.1 (9th Cir. 1987).

[1] Here we find an abuse of discretion because the district court erred when it failed to allow for the payment of the back wages into court, an event that would stop the running of penalties. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 574 n.9, 102 S.Ct. 3245,

3252 n.9, 73 L.Ed.2d 973 (1982); Swain v. Isthmian Lines, Inc., 360 F.2d 81, 87-88 n.26 (3rd Cir. 1966); Southern Cross Steamship Co. v. Firipis, 285 F.2d 651 659-60 (4th Cir. 1960), cert. denied, 365 U.S. 869, 81 S.Ct. 903, 5 L.Ed.2d 859 (1961). That option ought to be available to defendants.

[2] Our review of the district court's decision in this case suggests the possibility that the defendants have already tendered all or part of the back wages, but the decision is far from clear in that respect. If all of the back wages owed to a particular plaintiff have been tendered, the penalty wages will have ceased to accrue as to that plaintiff's claim. We emphasize that penalty wages found to have accrued up to the date of tender of back wages need not themselves be tendered in order to preclude the accrual of further penalties.

[3] We are aware that, under some circumstances, an appeal from a wage award may

itself stop the accrual of penalties if the appeal is taken on strong and reasonable grounds. Pacific Mail S.S. Co. v. Schmidt, 241 U.S. 245, 250-251, 36 S.Ct. 581, 582-83, 60 L.Ed. 982 (1916). See also Southern Cross Steamship Co. v. Firipis, 285 F.2d at 659. However, in those cases the courts were able to comment upon the strength of the appeal after having the benefit of full briefing on the merits, and did so at the time of deciding the cases on the merits. The courts were not attempting to divine the strengths of the appeal before them in advance for the purpose of setting a supersedeas bond. Given the posture of this case and the complexity of the issues, we are unable to decide the merits of the wage claims at this early stage of the proceedings, and we are unwilling to speculate on the outcome of the appeal.

[4] Based upon the above, we reverse the district court's order fixing the amount of the

supersedeas bond insofar as it is based upon the projected accrual of penalty wages, and we remand to that court for the limited purpose of re-setting the bond. In so doing, the district court shall determine whether the full amount of back wages (not including penalty wages or interest) has been tendered to the plaintiffs, or to any of them. If so, penalty wages shall be deemed to have ceased to accrue for the affected plaintiffs as of the date of the tender. If not, the penalties may be deemed to continue accruing until the back wages are tendered. As we have already stated, tender includes payment into court.[10] The bond required of the defendants shall be reduced accordingly.

[10]We hasten to add that nothing in this opinion is intended to suggest that all or any portion of the penalty wages, or back wages, should have been assessed against the defendants.

The stay of execution previously ordered by us shall remain in full force and effect without the further posting of bond until such time as the district court has entered its order setting the bond in a manner not inconsistent with this opinion.

REVERSED as to the bond, and REMANDED for the limited purpose of setting a new bond.

ENTERED ON

SEP 20 1990

BY DEPUTY NY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NELSON R. RABY, et al.,	)	
Plaintiff,	)	No. C90-5038T
-vs-	)	
M/V PINE FOREST, IN REM, DELICA SHIPPING, S.A., and INUI STEAMSHIP, CO., LTD.	)	ORDER
Defendant.	)	

On August 6, 1990, this Court entered Findings of Fact, Conclusions of Law and Judgment in the above-entitled cause.

In accordance with FRCP 58, this Court now orders the entry of a separate judgment. The clerk of the court is directed to enter judgment in this case.

The clerk of the court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 19th day of September 1990.

s/Jack E. Tanner
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NELSON R. RABY, ET AL.

-V-

JUDGMENT IN A CIVIL CASE

M/V PINE FOREST, ET AL.

CASE NO. C90-5038T

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_x_ Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

JUDGMENT IS ENTERED CONSISTENT WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED ON Aug. 6, 1990.

(ATTACHED)

ENTERED ON

SEP 20 1990

BY DEPUTY NY

ENTERED ON

AUG 06 1990

BY DEPUTY NY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NELSON R. RABY, et al., Plaintiff,	)	No. C90-5038T
-vs-	)	
M/V PINE FOREST, IN REM, DELICA SHIPPING, S.A., and INUI STEAMSHIP, CO., LTD. Defendant.	)	FINDINGS OF FACT CONCLUSIONS OF LAW AND JUDGMENT

THIS MATTER having come on for trial before the above-named court sitting without a jury, and plaintiffs being represented by counsel, and defendants being represented by counsel, and plaintiffs having produced evidence in support of their claims, and defendants having also produced evidence in this matter, and the court having heard and considered the argument of

counsel, and the court being fully advised in this matter, now makes the following:

FINDINGS OF FACT

1. The plaintiffs are thirteen Filipino seafarers represented by individual counsel, and eight Filipino seamen represented by AMOSUP, (Associated Marine Officers and Seamen's Union of the Philippines). AMOSUP is authorized to assert its members' statutory wage claims. AMOSUP makes no claim of its own. All 21 seamen were employed to serve as seamen on board the M/V Pine Forest, (defendant in rem) a vessel owned by defendant Delica Shipping, S.A., a Panamanian corporation, and flying the flag of the Republic of Vanuatu. The manager and operator of the vessel is defendant Inui Steamship Co., Ltd., a Japanese shipping company.

2. Plaintiffs Raby, Alvardo and Berido were the only plaintiffs who personally actually testified at the time of trial. The other ten

plaintiffs did not personally appear in court. Their failure to personally appear does not appear to be of their own doing. The court therefore finds that they were "unavailable" for trial. In these circumstances the depositions of the absent plaintiffs are admissible under Rule 32 of the Federal Rules of Civil Procedure and Rule 804(B) of the Federal Rules of Evidence.

3. None of the AMOSUP plaintiffs appeared at the time of trial. All eight (8) of AMOSUP plaintiffs were or are still in defendants' employ. These plaintiffs were, at all times relevant herein, under defendants' dominion and control.

4. The Philippine plaintiffs were recruited in Manila by Western Shipping Agency, a Philippine corporation and manning agent for defendants, Delica and Inui. The plaintiffs were being recruited for the first voyage of the M/V Pine Forest.

5. Each plaintiff signed an individual employment contract agreeing to serve on board the M/V Pine Forest. The contracts were signed in blank by plaintiffs at the Western Shipping office in Manila. There were no figures inserted therein for each plaintiffs' wages and, instead, the plaintiffs were told generally what the wage rates would be.

6. Each plaintiff joined the M/V Pine Forest in Japan on March 27, 1989, with the exception of plaintiffs Raby and Galua, who joined the vessel on July 22, 1989 and January 8, 1990 respectively. At that time, each plaintiff signed shipping articles on board the vessel that were in the substance and form prescribed by the Republic of Vanuatu. The shipping articles incorporated the Worldwide International Transport-Worker's Federation Collective Agreement and contained a significantly higher pay scale than the oral representations made to plaintiffs by Western

Shipping Agency in Manila. The shipping articles set forth the base monthly wage next to each seafarers name and signature.

7. On September 14, 1989, unknown to plaintiffs, the shipowner through its agent, Western Shipping Co., Ltd. in Manila, entered into a joint JSU/AMOSUP Collective Bargaining Agreement. Defendants recognized AMOSUP as the exclusive collective bargaining representative of all the Filipino seamen aboard the M/V Pine Forest. The AMOSUP Collective Bargaining Agreement contained significantly lower wages than those contained in the shipping articles and ITF Collective Bargaining Agreement executed by the plaintiffs when they boarded the M/V Pine Forest.

8. The defendants executed the JSU/AMOSUP agreement for the sole purpose of obtaining an ITF blue certificate and to enroll the M/V Pine Forest with the ITF. At all times relevant hereto, defendants never obtained the "blue

certificate." Thereafter, the Pine Forest traded exclusively between Japan and the Northwest coast of the United States.

9. From the date the plaintiffs joined the M/V Pine Forest until the vessel was arrested in Tacoma, Washington, on January 31, 1990, the vessel called on United States ports a total of eight times, arriving on the following dates in 1989: April 9, May 17, June 22nd, August 1st, September 17, October 26th, December 8th, and January 24, 1990. All of these voyages were between the United States and Japan.

10. The M/V Pine Forest carried logs and wood products from the Pacific Northwest to Japan. Upon returning to United States waters, it would discharge ballast and take on cargo. This court finds that ballast discharged is "cargo" as that term is used in 46 U.S.C. Section 10313 (f). One hundred percent of the income of the M/V Pine Forest since its launching was earned from these voyages carrying

wood products from the United States to Japan and back.

11. The plaintiffs were paid on a monthly basis. Each month the plaintiffs executed a pay voucher or "wage receipt" wherein each plaintiff certified he received the wages and benefits called for in the shipping articles and the ITF Collective Bargaining Agreement incorporated therein. Plaintiff never received the wages specified in the Shipping Articles.

12. The shipowner also required the plaintiffs to sign a separate receipt for wages actually paid by the master and received by each plaintiff. This practice is referred to by defendants as the keeping of "double books." At least one instance of double-bookkeeping occurred in the United States while the vessel was in Longview, Washington.

13. Defendants admit that they never intended to comply with the shipping articles and ITF wage scale. The conduct of defendants

in the practice of double-bookkeeping and its refusal to pay plaintiffs their rightful wages was fraudulent, intentional, and in bad faith. The seamen were in a very vulnerable position and were easily intimidated.

14. Plaintiffs signed receipts for the wages specified in the shipping articles while in United States waters only once, but defendants knew that all of the monthly wage receipts stipulating the higher wages were on board the M/V Pine Forest each time plaintiffs wages were wrongfully withheld at the end of eight separate voyages to United States waters.

15. In these circumstances, plaintiffs' execution of the shipping articles and their signing the wage receipts for the wages set forth in the shipping articles constituted a legally sufficient demand for payment of wages.

16. Plaintiffs' demand for wages and the defendants' illegal withholding of wages occurred while both plaintiffs and the M/V Pine

Forest were in U.S. Harbors or waters at the end of eight separate voyages from Japan to the United States.

17. The defendants' fraudulent actions requiring plaintiffs to sign two sets of conflicting wage receipts was a repudiation of their contractual obligation to pay plaintiffs the wages specified in the shipping articles, and discharged, by operation of law, plaintiffs duty to make formal demand for wages.

18. Application to 46 U.S.C. Section 10313(e) was triggered when plaintiffs' demand for payment of half wages earned and unpaid at each port at which the vessel discharged ballast was refused. Application of 46 U.S.C. Section 10313(f) was triggered when, at the end of a voyage, plaintiffs were not paid the balance of wages owing.

19. On January 31, 1989, the M/V Pine Forest was arrested in Tacoma, Washington. All plaintiffs except Silverio and Cabiltan were

aboard the vessel. Plaintiffs were claiming back due wages in accordance with the ITF shipping articles they had executed and which were their contract of employment.

20. On February 13, 1990, the total sum of $267,585.65 was tendered by defendants to the original thirteen plaintiffs for wages claimed through January 24, 1990, but the tender did not include penalty wages. The amount tendered did not include $15,019.20 in wages earned by the seamen between January 24th and February 8th, the date of final discharge which amount was claimed in plaintiffs' amended complaints for back wages. Payments were made without admission of liability and with reservations of right to collect same if court found in favor of defendants. Penalty wages are included in the definition of wages. Defendants have failed to show sufficient cause for withholding payment of penalty wages once back due wages were paid in February of 1990.

21. At the time the thirteen original plaintiffs signed off the M/V Pine Forest in Tacoma, Washington, defendants directed the captain to make a notation in each plaintiffs' Seamen's Book in the column entitled "Reason for Discharge:" "Requested repatriation upon filing wage claim to arrest vessel."

22. These notations in the plaintiffs' Seamen's Books rendered them unemployable in the Philippines as merchant seamen and they have been effectively "blacklisted" from obtaining future employment on ocean-going vessels.

23. It was the intent of the defendants, when the notations were made, to punish the plaintiffs for having made a claim for their wages by entering the above-notations and making them unemployable as merchant seamen.

24. After the repatriation of the thirteen original plaintiffs to the Republic of the Philippines, none of them were able to find employment as seamen because of the notations

made in each plaintiffs' Seamen's Books. At least four of the plaintiffs were personally refused employment.

25. The plaintiffs are not able to obtain new Seamen's Books because of the applicable regulations of the Philippine Coast Guard and will not be able to do so in the future.

26. Any overtime worked by plaintiffs never appeared in the ship's log.

27. Defendants ordered the captain of the M/V Pine Forest to alter the ship's shipping articles. The captain then ordered the chief engineer to actually alter the articles.

28. All of the other defendants' ships have been and are now operated in the same manner as the M/V Pine Forest as to the payment of seamen's wages and double bookkeeping.

29. Before the M/V Pine Forest left Tacoma, after the arrest, six of the AMOSUP plaintiffs executed documents entitled "Voluntary Dismissals" prepared by defense counsel with

plaintiffs' signatures procured by the master of the vessel. The court finds that these documents were executed by plaintiffs under conditions of intimidation and coercion, and, therefore, they have no legal effect.

30. The court finds that each trip of the M/V Pine Forest from Japan to the United States was a "voyage" as that term is used in 46 U.S.C. Section 10313.

31. This court finds that the conduct by the defendants at all times relevant herein was intentional, deliberate, reckless, callous, flagrant, malicious, indifferent, and unconscionable. That such conduct by the defendants was to intimidate, coerce and punish the plaintiffs. That such conduct was in complete disregard of the plaintiffs' rights. That defendants' conduct at all times relevant herein, violates the laws and public policy of the United States. The plaintiffs herein are entitled under statute and general maritime law

of the United States to the protection of the courts.

32. The facts and circumstance in this case have convinced this court that plaintiffs are entitled to punitive damages in such an amount as will punish the defendants to stop their past, continuing and ongoing tortious conduct in operation of the M/V Pine Forest and those other ships that they operate that sail into any port in the United States. That the awarding of punitive damages against the defendants will serve to punish defendants for their conduct and to deter others from following defendant's example.

33. The thirteen (13) Original Plaintiffs are entitled to back pay including penalty wages as follows:

13 ORIGINAL PLAINTIFFS	BACK WAGES	PENALTIES (as of 5/21/90)
Camilo Alvarado	$ 7,235.88	$ 597,706.96
Nelson Raby	2,894.19	205,187.25

Teofaniz Roz	1,555.95	480,685.44
Apolonio Torreliza	1,621.29	480,685.44
Leo Ajero	1,762.72	463,426.56
Teodoro Rabie	2,894.19	280,613.44
Modesto Berido	875.91	280,613.44
Marcelo Suarez	875.91	280,613.44
Miguelto Cabales	1,240.61	280,613.44
Teodoro Marquez	548.26	210,381.76
Leonardo Bonnit	626.19	210,381.76
Hermenigildo Banogon	938.79	210,381.76
Cervasito P. Laxina	626.19	210,381.76

34. The eight (8) AMOSUP plaintiffs are entitled to back wages and penalties as follows:

S. Galua	$ 2,686.90	$ 26,329.68
Bonifacio Tabada	9,551.57	480,685.44
Can Machete	29,175.90	463,462.56
Francisco Yabo	18,096.49	311,428.80
Guelberto Bete	16,065.54	280,613.44
G. Villaruel	16,065.54	280,613.44
Russell Silrerio	20,044.20	391,924.43
Mario Cabiltan	30,549.91	564,404.72

35. The thirteen (13) Original Plaintiffs are entitled to compensatory damages which includes loss of future income and mental distress, as follows:

13 ORIGINAL PLAINTIFFS:	**LOSS OF FUTURE INCOME**	**EMOTIONAL DISTRESS**
Camilo Alvarado	$ 950,586.00	$ 100,000.00
Nelson Raby	892,534.00	100,000.00
Teofaniz Roz	649,665.00	100,000.00
Apolonio Torreliza	554,737.00	100,000.00
Leo Ajero	676,302.00	100,000.00
Teodoro Rabie	379,260.00	100,000.00
Modesto Berido	390,009.00	100,000.00
Marcelo Suarez	464,441.00	100,000.00
Miguelito Cabales	480,301.00	100,000.00
Teodoro Marquez	360,091.00	100,000.00
Leonardo Bonnit	353,874.00	100,000.00
Hermenigildo Banogon	341,649.00	100,000.00
Guelberto P. Laxina	307,021.00	100,000.00

36. The eight (8) AMOSUP plaintiffs are entitled to compensatory damages for mental distress as follows:

AMOSUP PLAINTIFFS:	**LOSS OF FUTURE INCOME**	**EMOTIONAL DISTRESS**
S. Galua	NONE	$ 50,000.00
Bonifacio Tabada	NONE	50,000.00
Can Machete	NONE	50,000.00
Francisco Yabo	NONE	50,000.00
Guelberto Bete	NONE	50,000.00
G. Villaruel	NONE	50,000.00
Russel Silrerio	NONE	50,000.00
Mario Cabiltan	NONE	50,000.00

37. All plaintiffs are entitle to punitive damages as follows:

13 ORIGINAL PLAINTIFFS:	**PUNITIVE DAMAGES**
Camilo Alvarado	$ 1,000,000.00
Nelson Raby	1,000,000.00
Teofaniz Roz	1,000,000.00
Apolonio Torreliza	1,000,000.00
Leo Ajero	1,000,000.00

Teodoro Rabie	1,000,000.00
Modesto Berido	1,000,000.00
Marcelo Suarez	1,000,000.00
Miguelito Cabales	1,000,000.00
Teodoro Marquez	1,000,000.00
Leonardo Bonnit	1,000,000.00
Hermenigildo Banogon	1,000,000.00
Cervasito P. Laxina	1,000,000.00
AMOSUP PLAINTIFFS:	
S. Galua	$ 500,000.00
Bonifacio Tabada	500,000.00
Can Machete	500,000.00
Francisco Yabo	500,000.00
Guelberto Bete	500,000.00
G. Villaruel	500,000.00
Russel Silrerio	500,000.00
Mario Cabiltan	500,000.00

38. The plaintiffs, as the prevailing party herein, are entitled to be awarded reasonable attorneys' fees, and interest.

The court finds the foregoing Findings of Fact to have been shown by a preponderance of the evidence in this matter.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

All Findings of Fact more appropriately termed Conclusions of Law will be incorporated as such.

1. This court has jurisdiction of this matter under the United States Constitution Article III pursuant to federal Admiralty and Maritime jurisdiction; 28 U.S.C. Section 1333; and pursuant to 46 U.S.C. Section 10313(i) of the Shipping Code.

2. That defendant vessel and plaintiffs were located in Tacoma, Pierce County, Washington at the time of the filing of the complaint herein.

3. Federal law rather than State of Washington law controls damage issued when the

cause of action arises under Federal Maritime Law.

4. All of plaintiffs' claims for back wages, including penalty wages, compensatory damages for tort, and punitive damages are properly before this court. Defendants' intentional, fraudulent, bad faith conduct is a maritime tort resulting in a maritime lien for compensatory and punitive damages.

5. The tolling of the statute of limitations does not occur until back due wages and penalties have been paid in full.

6. The seamen are entitled to two days' wages for each day payment was withheld from the date of each wrongful withholding until full wages and penalties wages are paid. Penalty wages will continue to accrue at two times each plaintiff's rate of pay until the actual payment is received. Those plaintiffs hereinafter mentioned are awarded as back pay including penalties the following sums of money:

13 ORIGINAL PLAINTIFFS	BACK WAGES	PENALTIES
Camilo Alvarado	$ 7,235.88	$ 597,706.96
Nelson Raby	2,894.19	205,187.25
Teofaniz Roz	1,555.95	480,685.44
Apolonio Torreliza	1,621.29	480,685.44
Leo Ajero	1,762.72	463,426.56
Teodoro Rabie	2,894.19	280,613.44
Modesto Berido	875.91	280,613.44
Marcelo Suarez	875.91	280,613.44
Miguelto Cabales	1,240.61	280,613.44
Teodoro Marquez	548.26	210,381.76
Leonardo Bonnit	626.19	210,381.76
Hermenigildo Banogon	938.79	210,381.76
Cervasito P. Laxina	626.19	210,381.76
AMOSUP PLAINTIFFS:		
S. Galua	2,686.90	26,329.68
Bonifacio Tabada	9,551.57	480,685.44
Can Machete	29,175.90	463,462.56
Francisco Yabo	18,096.49	311,428.80
Guelberto Beta	16,065.54	280,613.44

G. Villaruel	16,065.54	280,613.44
Russell Silrerio	20,044.20	391,924.43
Mario Cabiltan	30,549.91	564,404.72

7. Those plaintiffs hereinafter mentioned are awarded as compensatory damages for the outrageous, malicious and intentional conduct of the defendants, especially, but not limited to, the entry of the notations in the thirteen Seamen's Books. The making of the notations made the thirteen Seamen unemployable. That such conduct of the defendants was for retaliation and punishment of the plaintiffs for requesting what they were lawfully entitled to, their wages. That defendants conduct at all times relevant herein, caused plaintiffs duress, emotional distress, and prevented them from being employable as seamen.

13 ORIGINAL PLAINTIFFS:	**LOSS OF FUTURE INCOME**	**EMOTIONAL DISTRESS**
Camilo Alvarado	$ 950,586.00	$ 100,000.00
Nelson Raby	892,534.00	100,000.00

Teofaniz Roz	649,665.00	100,000.00
Apolonio Torreliza	554,737.00	100,000.00
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Leonardo Bonnit	353,874.00	100,000.00
Hermenigildo Banogon	341,649.00	100,000.00
Guelberto P. Laxina	307,021.00	100,000.00

AMOSUP PLAINTIFFS:	**LOSS OF FUTURE INCOME**	**EMOTIONAL DISTRESS**
S. Galua	NONE	$ 50,000.00
Bonifacio Tabada	NONE	50,000.00
Can Machete	NONE	50,000.00
Francisco Yabo	NONE	50,000.00
Guelberto Bete	NONE	50,000.00
G. Villaruel	NONE	50,000.00
Russel Silrerio	NONE	50,000.00
Mario Cabiltan	NONE	50,000.00

8. That plaintiffs hereinafter mentioned are awarded punitive damages under general maritime law because of the callous, deliberate, unconscionable, reckless, indifferent, intentional, flagrant, fraudulent, unlawful and malicious conduct of defendants' agents at all times relevant herein. The evidence is clear and convincing and beyond a preponderance of the evidence that defendants' agents were at all times acting within the scope of their employment and were acting for and at the direction of the defendants.

13 ORIGINAL PLAINTIFFS:	**PUNITIVE DAMAGES**
Camilo Alvarado	$ 1,000,000.00
Nelson Raby	1,000,000.00
Teofaniz Roz	1,000,000.00
Apolonio Torreliza	1,000,000.00
Leo Ajero	1,000,000.00
Teodoro Rabie	1,000,000.00
Modesto Berido	1,000,000.00
Marcelo Suarez	1,000,000.00

Miguelito Cabales	1,000,000.00
Teodoro Marquez	1,000,000.00
Leonardo Bonnit	1,000,000.00
Hermenigildo Banogon	1,000,000.00
Cervasito P. Laxina	1,000,000.00

AMOSUP PLAINTIFFS:

S. Galua	$ 500,000.00
Bonifacio Tabada	500,000.00
Can Machete	500,000.00
Francisco Yabo	500,000.00
Guelberto Bete	500,000.00
G. Villaruel	500,000.00
Russel Silrerio	500,000.00
Mario Cabiltan	500,000.00

9. Defendants are entitled to an offset in the amount of $267,585.65.

10. Any and all documents signed by plaintiffs herein after the arrest of the vessel are null and void and have no legal effect. Plaintiffs have shown good cause pursuant to 46

U.S.C. Section 10313(e), and the Voluntary Dismissals are hereby set aside.

11. In accordance with 46 U.S.C. 10313, prejudgment interest is awarded to the plaintiffs on the award of back wages and on penalty wages, on the date when the wages first came due, i.e., when the ship entered United States waters. Interest shall begin to run on the compensatory and punitive damages as of the date of entry of judgment herein.

13. Interest is awarded and shall accrue in accordance with 28 U.S.C. Section 1961. Judgment is entered against the defendants, the M/V Pine Forest in rem and Delica Shipping, S.A. and Inui Steamship Co., Ltd., jointly and severally in personam for plaintiffs' compensatory and punitive damages, back wages, penalty wages, and for reasonable attorneys' fees, interest and costs.

14. Plaintiffs as the prevailing party herein shall be awarded reasonable attorneys'

fees in an amount to be determined at a later date. Award of attorneys' fees is predicated on defendants' bad faith and is proper under Vaughn v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d 88 (1962).

15. The plaintiffs shall recover their costs and expenses in such sums as are determined by the clerk of the court.

16. Judgment is further entered for additional penalty wages which shall continue to accrue for each plaintiff seaman from May 21, 1990, at two (2) times each plaintiff's daily rate of pay until actual receipt of payment. The exact amount of these additional penalty wages shall be computed at the time of payment.

DATED this 6th day of August 1990.

s/Jack E. Tanner
UNITED STATES DISTRICT JUDGE

"(a) A seaman's entitlement to wages and provisions begins when the seaman begins work or when specified in the agreement required by section 10302 of this title for the seaman to begin work or be present on board, whichever is earlier.

(b) Wages are not dependent on the earning of freight by the vessel. When the loss or wreck of the vessel ends the service of a seaman before the end of the period contemplated in the agreement, the seaman is entitled to wages for the period of time actually served. The seaman shall be deemed a destitute seaman under section 11104 of this title. This subsection applies to a fishing or whaling vessel but not a yacht.

(c) When a seaman who has signed an agreement is discharged improperly before the beginning of the voyage or before one month's wages are earned, without the seaman's consent and without the seaman's fault justifying discharge, the

seaman is entitled to receive from the master or owner, in addition to wages earned, one month's wages as compensation.

(d) A seaman is not entitled to wages for a period during which the seaman--

(1) unlawfully failed to work when required, after the time fixed by the agreement for the seaman to begin work; or

(2) lawfully was imprisoned for an offense, unless a court hearing the case otherwise directs.

(e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this

subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside, for good cause shown, the release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay

to the seaman 2 days' wages for each day payment is delayed.

(h) Subsections (f) and (g) of this section do not apply to a fishing or whaling vessel or yacht.

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari has been served upon **Paul Wonacott and Kate McKeon**, Wood, Tatum, Mosser, Brooke & Landis, Suite 1300, 1001 S.W. Fifth Avenue, Portland, Oregon 97204, and **Joe Stacey**, LeGros, Buchanan, Paul & Whitehead, 2500 Columbia Center, 701 Fifth Avenue, Seattle, Washington 98104-7098, by United States Mail, postage prepaid.

Baton Rouge, Louisiana, this 8th day of March, 1991.

RICHARD J. DODSON

Supreme Court, U.S.
FILED
APR 11 1991
OFFICE OF THE CLERK

No. 90-1430

In The

Supreme Court of the United States

October Term, 1990

NELSON R. RABY, et al.,

Petitioners,

versus

M/V PINE FOREST, *In Rem*, DELICA SHIPPING, S.A., and INUI STEAMSHIP CO., LTD.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents' Counterstatement

I. Did the Court of Appeals err in ruling that a shipowner who has paid or tendered the wages demanded by seamen need not also tender all statutory penalties claimed by plaintiffs under 46 U.S.C. § 10313 in order to toll accrual of further statutory penalties?

II. Did the Court of Appeals err in ruling that, when the district court's opinion does not make it clear whether all wages were paid, and the opinion contains inconsistent statements about the amounts, if any, of additional wages due, the shipowner should have the option of tendering into court any disputed wages in order to stop the accrual of statutory penalties?

LIST OF ALL PARTIES TO THE PROCEEDING

Respondents' Correction

Petitioners have omitted from the list of parties to the proceeding below the name of plaintiff Associated Marine Officers and Seamen's Union of the Philippines, referred to more commonly in this case as AMOSUP.

In addition, eight of the persons named in this action as plaintiffs were named as plaintiffs by AMOSUP; and AMOSUP brought all claims on their behalf. There has been no evidence that any of them intended to join in this action or authorized or ratified the use of their names as plaintiffs. These persons are S. Galua, Bonifacio Tabada, Can L. Machete, Francisco F. Yabo, Guilberto A. Bete, G. Villarruel, Russel L. Silverio and Mario D. Cabiltan.

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COUNTER STATEMENT OF JURISDICTION

Respondents deny that the federal courts have jurisdiction of this action. No American citizen, domiciliary or corporation is a party to this dispute. The action is predicated on 46 U.S.C. § 10313 and admiralty jurisdiction. Respondents contend that the claim under 46 U.S.C. § 10313 is brought in bad faith and that the claims alleged to be maritime torts do not satisfy the locus requirement for admiralty jurisdiction, in that they occurred in part on land.

COUNTER STATEMENT OF THE CASE

This is an action by Filipino seamen and a Philippine labor union against a Vanuatu flag vessel, her Panamanian owners and a Japanese ship operator. Plaintiffs assert claims for wages, statutory penalties under 46 U.S.C. § 10313, fraud and blacklisting. Plaintiffs allege jurisdiction under 46 U.S.C. § 10313(i), which grants a foreign seafarer the right to sue in federal district court for wages and a statutory double-wage penalty while in a port of the United States.

In this case, the crew of the M/V PINE FOREST entered into written employment agreements with manning agent in Manila. The agreements were in the form prescribed by the Philippine government through the Philippine Overseas Employment Agency (POEA). The POEA established the contractual wage the seamen were to be paid. After the agreements were executed, they were approved by the POEA.

The seamen were hired to man the M/V PINE FOREST for one year. The crew sailed on the PINE FOREST from March 27, 1989 until January 31, 1990. Before the crew's contracts expired the ship was arrested in Tacoma, Washington by a lawyer from Baton Rouge, Louisiana named Richard J. Dodson.

There was no dispute below that the seamen had received all the wages due them each month under the POEA agreements they had signed. Their complaint alleged that they were entitled to more than this, however, because a wage higher than the POEA wage had been inserted into the shipping articles after the plaintiffs had signed them.

It had been a widespread practice for many years for flag of convenience vessels to hire Philippine seafarers on the understanding that they would receive the rate of pay specified in their POEA contracts, but would sign shipping articles and wage receipts reflecting a much higher rate, called the "ITF worldwide wage scale."[1] The practice had been instituted in response to a campaign by the International Transport Workers Federation (the ITF) and its affiliated unions to destroy flag of convenience shipping through boycotts and work stoppages at the ships' ports of call. (A "flag of convenience" is the means by which a shipowner "flags out" a ship to a foreign registry, such as Liberia or Panama, in order to crew the ship with seamen from countries other than the country of beneficial ownership.) The ITF, whose main constituency is Western European seamen commanding wages much higher than those received by Third World seamen, acts against vessels that pay wages lower than ITF worldwide wage scale. By making it just as expensive to employ a

Filipino crew as a British or Norwegian one, the ITF hopes to remove the economic advantages of flags of convenience.

The three seamen who testified at trial of this case admitted that, on this ship as well as others on which they had worked for other owners, they had agreed to sign two wage receipts each month, one reflecting their actual pay, the other reflecting the ITF worldwide wage. They also admitted that they had agreed to memorize this wage scale so that they could tell any ITF organizer who might board the ship that they were receiving ITF-approved wages.

The three seamen who testified also admitted that before signing the shipping articles they had been told they would receive the POEA wage. At trial, though, they contended that they had taken the figures in the shipping articles seriously, and had formed the belief that they were entitled to the ITF wage rate reflected in that document.

The claim under 46 U.S.C. § 10313 was based on the theory that the shipping articles were the controlling contract and that substantial back wages were due because the ITF worldwide wage rate written in that document had not been paid.

The action was commenced on January 30, 1990, by 11 individual crew members, who demanded $231,198.58

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[1] The ITF worldwide wage scale is an average of the wages paid to seafarers in the countries which own the highest percentages of the world's chipping tonnage.

as back wages and $2.3 million as the double wage penalty provided in 46 U.S.C. § 10313. Plaintiffs contended that statutory penalties accrued each time the ship completed a trip to either Japan or the United States. The ship was arrested on her fifteenth trip. Plaintiffs contended that as of that time, the statutory penalty amounted to 15 times plaintiffs' daily wage rate.

The first amended complaint, dated February 7, 1990, added two more individual plaintiffs, and demanded a total of $268,835.14 in back wages for the 13 individuals. A Philippine labor union, AMOSUP, was also added as a plaintiff. The union asserted a wage claim on behalf of its members for $160,744.96. The first amended complaint demanded $5.4 million in statutory penalties. The second amended complaint, dated February 12, 1990, made the same wage and penalty claims as the first amended complaint, and added additional claims for blacklisting and fraud.

On February 13, 1990, plaintiffs' counsel accepted defendants' tender to the individual – i.e., non-AMOSUP – plaintiffs of one check for $231,198.58 and another for $36,387.07, for a total of $267,585.65.[2]

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[2] Defendants took the position throughout the litigation that a claim for statutory penalties under 46 U.S.C. § 10313 was personal to the seaman and could not be asserted in a representative capacity by a foreign labor union. The claims asserted by the union were on behalf of individuals who refused to sign or otherwise verify the complaints, who signed dismissals of all claims, and who remained with the ship after the lawsuit was commenced, when the individual plaintiffs left. None of these individuals was ever deposed and none testified at trial.

At trial, plaintiffs' own witness, an economist named Randolph Rice, testified that the total of $267,585.65 tendered to these individual plaintiffs actually **overpaid** them the ITF wage scale by $15,610. Exhibit 1 (transcript of Rice trial testimony). This testimony was uncontradicted at trial. Despite this testimony the district court found that plaintiffs had been **underpaid** their wages by $15,019.20, *see* trial court's opinion, Petitioners' App., p. 46, Finding of Fact No. 20. Then, without explanation, the district court awarded these same plaintiffs a total of $23,696.08 in wages. *Id.*, Finding of Fact No. 33, Conclusion of Law No. 6. The record contains no explanation for this inconsistency. The court imposed statutory penalties for "nonpayment." The court also found that defendants' tender of $267,585.65 did not constitute a tender of wages because the tender did not include the millions in penalties which plaintiffs had also demanded. *Id.* at Finding of Fact 20. Accordingly, the court held that, despite the wage tender, penalties would continue to accrue until both wages and penalties were paid.

The trial court found for plaintiffs on every theory they advanced – including theories that were not included in the pretrial order and theories that were expressly excluded from the case prior to trial. The court entered a judgment for $32.6 million, and held that penalties continued to accrue. The judgment consisted of awards of $165,932.13 in additional wages, $6.9 million in statutory penalties, $17 million in punitive damages, $1.7 million for emotional distress, and $6.8 million for lost income. The court subsequently entered a judgment for $672,200 against defendants for attorney fees and costs.

Defendants moved immediately to set a supersedeas bond in an amount less than the judgment on the ground of severe financial hardship and offered to provide alternative security pending an appeal. Plaintiffs filed a motion requesting that the supersedeas bond be set at $59 million. The court granted plaintiffs' motion the same day.

Defendants filed an emergency motion asking the Court of Appeals to set aside the trial court's order and to reset the supersedeas bond. The Court of Appeals reversed the trial court's order setting supersedeas at $59 million for abuse of discretion. *Raby v. M/V PINE FOREST,* 918 F.2d 80 (9th Cir. 1990). The Court of Appeals held that defendants were not required to tender to plaintiffs both wages and claimed accrued penalties in order to stop the accrual of further penalties. The Court of Appeals also noted that approximately $19 million of the amount required for the supersedeas bond was attributable to penalty wages that the trial court expected to accrue during the pendency of the appeal. Because it was not clear from the record whether all wages had actually been paid, said the Court of Appeals, defendant should be given the opportunity to tender disputed wage amounts into court and thereby stop the accrual of further millions in penalties during the appeal.

The Court of Appeals instructed the District Court to determine on remand whether all back wages had actually been paid.

A hearing was held before the trial court on the matters that were remanded. While the hearing was in progress, the trial court urged the parties to settle the

bond dispute. The parties reached a settlement during a lunch break, and they read into the record their agreement that the supersedeas bond be set at $42,004,322. Despite this settlement agreement, plaintiffs filed the present petition for writ of certiorari.

The foregoing Statement of the Case is only a sketch of some of the facts and proceedings in this case. Defendants have attempted to give the Court just enough background for it to be aware that the case is far more complex than plaintiffs' petition suggests, and that any intervention in the proceedings at this point, before a decision by the Court of Appeals merits panel on full briefing, can have very serious unintended effects. The Court should be aware that defendants have identified over a hundred legal errors arising from substantive, procedural and evidentiary rulings of the trial court in this case.

WHY THE PETITION SHOULD BE DENIED

I. Assuming arguendo that the petition meets the requirements of Rule 10, it clearly does not meet the requirement of Rule 11: that a petition for writ of certiorari to review a case before judgment in the Court of Appeals will only be granted when the case is of "such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this court."

Plaintiffs acknowledge that they are seeking a writ of certiorari before judgment in the Court of Appeals. They recognize that they must meet the requirement of Supreme Court Rule 11 that the case must be of "such

imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court."

Yet plaintiffs do not at any point argue, let alone demonstrate, that the issues they raise are of imperative public importance. The only argument they make is that there is a conflict in the circuits on the issues allegedly raised by the decision of the Court of Appeals motions panel and that uniformity on these issues is needed. If plaintiffs can establish this conflict and the need for uniformity on these issues, they would eventually become candidates for certiorari under Supreme Court Rule 10 after there has been a final judgment in the Court of Appeals. But a conflict in the circuits does not establish "imperative public importance." Obviously, not every conflict between the circuits rises to this level.

On its face there is no apparent urgency about resolving the issue of whether, after a payment of almost $300,000 in wages, a disputed $15,000 can be paid into court in order to toll the accrual of statutory penalties. There is certainly no showing that either foreign seamen or foreign shipowners have an extraordinary need to know this Court's opinion on this subject and to know it right away.

II. It is not clear that there is any conflict in the circuits.

The purported conflict in the circuits is between the Third and Fourth Circuits on the one hand, and the Eleventh Circuit on the other. In *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81 (3rd Cir. 1966) and in *Southern Cross S.S.*

Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960) *cert. denied*, 365 U.S. 869 (1961) the Third and Fourth Circuits held that wages could be tendered into court to toll the running of statutory penalties. The Eleventh Circuit, in *Chung Yong Il v. Overseas Navigation Co., Ltd.*, 774 F.2d 1043 (11th Cir. 1985) *cert. denied sub nom. Hibernia Nat'l Bank v. Yong Il Chung*, 475 U.S. 1147 (1986) (White, J., dissenting) held that a bond posted to obtain release of an arrested vessel was not sufficient to toll the running of statutory penalties.

The Ninth Circuit cited *Swain* and *Southern Cross* when it held that, because the record was not clear on whether wages had been paid in full to the plaintiffs, defendants should have been given the option of tendering the disputed wages into court.

It is not necessary to interpret the decision of the Court of Appeals in the present case as declaring a general rule that a shipowner may always pay back wages into court in order to stop the running of penalties under 46 U.S.C. § 10313(f). This is an extraordinary case. It is still not clear how much in back wages the trial court thought was due, nor how much was in fact paid to plaintiffs by their lawyer. There is no way to know what the Court of Appeals will ultimately determine to be "sufficient cause" for not paying the ITF worldwide wage scale. The cases from the Third, Fourth and Eleventh Circuits did not involve facts anything like these. Accordingly, it is by no means clear that those courts, faced with facts like those in this case, would not have reached the same result as the Ninth Circuit did.

The appeal on the merits now pending before the Ninth Circuit will present the issues raised in the supersedeas proceedings as well as those raised by the trial, and it will present them in a complete, ordered, factual setting. When this case has made its way through the Court of Appeals on the merits it might present questions which would justify a writ of certiorari. It is too soon to tell.

III. Since plaintiffs settled with defendants on the amount of the supersedeas bond, they necessarily abandoned their right to further appeal the Court of Appeals' decision.

On January 28, 1991, plaintiffs stipulated to a bond for $42,004,322 as adequate security. The bond was executed by defendants on January 30, 1991, and approved by the district court on February 5, 1991. The bond remains in effect during the appeal in the Court of Appeals. The amount of bond required to stay execution of the judgment is now moot.

CONCLUSION

The Supreme Court should deny the petition because:

1. The interlocutory ruling by the Court of Appeals is not of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this court.

2. It is not clear that there is any conflict among the circuits, and if there were, the record is too factually undeveloped to resolve that conflict.

3. Since plaintiffs have stipulated to the amount of the supersedeas bond, they have waived their right to appeal the Court of Appeals' decision.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NELSON R. RABY, et al., Plaintiffs, v. M/V PINE FOREST, *In Rem*, DELICA, SHIPPING, S.A.; and INUI STEAMSHIP CO., LTD., Defendants.	USCA No. USDC No. C90-5038T Tacoma, Washington May 21, 1990

VERBATIM TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JACK E. TANNER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the 13 Plaintiffs:	RICHARD J. DODSON THOMAS E. RICHARD SCOTT M. STICKNEY JOHN W. MERRIAM
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For the Defendants:	JOSEPH S. STACEY RICHARD J. C. MORGAN PAUL N. WONACOTT KATHLEEN McKEON
Court Reporter:	PAUL J. FREDERICKSON

Proceedings recorded by mechanical stenography, transcript produced by computer.

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* * *

RICE-Cross

[p. 91] Q. Now, I believe when we had your deposition at Baton Rouge that there was a calculation that showed that the men were overpaid by $15,000; is that correct?

A. Yes.

Q. Okay. Where is that shown?

A. I don't – I didn't prepare this booklet, so I haven't seen it today.

MR. DODSON: Mr. Stacey, I gave you those figures and you were to put them in the notebooks. I would stipulate that they should go in the notebooks. If they didn't go in, they should be added. There was a calculation, a few men were underpaid and a few were overpaid, and if you add them in the notebook, then we will stipulate that was Dr. Rice's testimony.

MR. STACEY: Well, I think we can do that right away.

MR. DODSON: I want everything from the deposition in [p. 92] the notebook, and it was supposed to be in the notebook.

MR. STACEY: Your Honor, is he addressing me?

MR. DODSON: Yes, I am.

THE COURT: Let's not have the interchange between counsel.

Is there something to Plaintiffs' Exhibit 6 that should be added to Plaintiffs' Exhibit 6?

MR. STACEY: I believe I have it here, Your Honor.

MR. DODSON: You have part of it. We we agreed and stipulated that everything from his figures in Baton Rouge to be put in the notebook. If they're not in there –

THE COURT: Just a moment, just a moment, counsel.

If you have something additional you want to do, give it to the witness. If he can identify it and recognizes where it comes from, the plaintiff or defendant, I'm going to admit it as part of Plaintiffs' 6.

MR. STACEY: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. STACEY: Thank you.

Q. I'm showing the witness what is marked Balance of Wages Due, No. 3 Exhibit, Rice.

Do you recognize that document, please, sir?

A. Yes.

Q. And was that prepared by you?

A. With my knowledge, yes, sir.

[p. 93] Q. Okay. And what does that document represent?

A. Of the wages that were paid originally, those that were ultimately paid, and so the balance due is a comparison of how those numbers stack up against each other. And you're correct that in total, for the 13, Mr. Dodson's clients, there is an overpayment of $15,610.78.

Q. Okay. And what scale did you use?

THE COURT: Are you offering it?

MR. STACEY: Yes, please, Your Honor.

THE COURT: It will be known as Plaintiffs' 6-A.

MR. STACEY: Thank you.

[Plaintiffs' Exhibit 6-A admitted.]

Q. What did you use for a scale on Exhibit 6-A?

A. The wage rates?

Q. Yes, what contract?

A. ITF.

Q. ITF?

A. Yes, I'm sorry.

Q. So on the ITF contract scale the defendants overpaid the plaintiffs by a sum of $15,000, was that your calculation, sir?

A. As presented to me, yes.

Q. Was that presented, that information that you used to derive that overpayment figure, given to you by the plaintiffs' lawyer, Mr. Dodson?